No. 73-235

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Supreme Court of the United States

OCTOBER TERM, 1973

MARCO DE FUNIS, *et al.*,
Petitioners;

v.

CHARLES ODEGAARD, PRESIDENT OF THE UNIVERSITY OF WASHINGTON, *et al.*

On Writ Of Certiorari To The Supreme Court Of The State Of Washington

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BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

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This brief *amicus*, in support of the position of the petitioners, is filed by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), with the consent of the parties as provided for in Rule 42 of the Rules of this Court.

INTEREST OF THE AFL-CIO

In the instant case the Supreme Court of the State of Washington held that the University of Washington Law School could prefer for admission to the limited number of places in the Law School's first year class, applicants of certain races (black Americans, Chicano Americans, native

American Indians and Philippine Americans), who were acknowledgely less qualified under the School's admission standards than applicants of other races. That court concluded that this system of racial classification was justified by the elimination of "racial imbalance within public legal education," (507 P.2d at 1182), the production of "a racially balanced student body at the law school," (*id.* at 1184), and the alleviation of a nation-wide "shortage of minority attorneys," (*ibid*).

The position of the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) is that this holding can not be squared with the Fourteenth Amendment's guarantees of due process and the equal protection of the laws.

The AFL-CIO is a federation of 113 national and international unions having a total membership of approximately 13,500,000 working men and women. The Federation's interest in the question presented here is the product of the following interrelated considerations:

First:

> "[T]he labor movement is the most integrated major institution in American society, certainly more integrated than the corporations, the churches, or the universities. * * * The percentage of blacks in the unions is a good deal higher than the percentage of blacks in the total population. * * * Moreover, blacks are joining unions in increasing numbers. According to a 1968 report by *Business Week*, one out of every three new union members is black." Rustin, *The Blacks And The Unions*, Harper's Magazine, May, 1971, pp. 73, 76.

The major function of the trade union movement is to act

as its members' exclusive bargaining representative in dealing with their employers on matters of "wages, hours, and other terms and conditions of employment." See §§(a)(5), 8(d) & 9(a) of the National Labor Relations Act, as amended, 29 U.S.C. §151 *et seq.* And as this Court has recognized:

> "Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make then invalid. The complete satisfaction of all represented is hardly to be expected. * * * Differences in wages, hours and conditions of employment reflect countless variables." *Ford Motor Co.* v. *Huffman*, 345 U.S. 330, 338.

Thus, unions are front-line institutions dealing with and attempting to harmonize, on a day-to-day basis, the inevitable clashes of economic interest between individual employees and between groups of employees (as well as those between employees as a class and their employers).

Organized labor, therefore, well understands that there is no escape from the necessity of rules of selection where there are more applicants than there are openings, whether the places to be filled are jobs, or positions in a professional school (which serves as the method of entry to a particular field of endeavor). And the union movement is fully cognizant that in our society, where employment is a major determinant of economic position, such rules are perhaps the most important of all the norms governing the allocation of scarce resources. Precisely because this is so, organized labor knows that if there is to be domestic tranquility these rules must be fair in fact and must be per-

ceived to be fair by those whose fate they decide.

George Lichtheim has pointed out: "If economic conflict as a source of political antagonism is ruled out * * * the residual tensions * * * need not and doubtless will not fall to zero; but they can be held down to a tolerable level." *What Socialism Is and Is Not,* The New York Review of Books (April 9, 1970) p. 5. Job competition (of which access to professional training is but one form), then, in itself, is perhaps the most volatile of social forces. This force is most potent in a period, such as the present, in which high and rising unemployment, spiraling inflation, a gathering recession, sudden shortages of basic resources requiring a radical restructuring of established life and work patterns, and an overall pace of technological, social, and political change of frightening rapidity, maximize normal anxieties about what the future holds. In this context when job competition is combined with competition on the basis of race the result is a quantum jump in the potential for a violent disequilibrium.

The union movement, both as a matter of principle and on the basis of its practical experience, is, therefore, firmly committed to the proposition that the one best hope for achieving social harmony is to require that these rules of selection must make "job * * * qualifications the controlling factor, so that race, religion, nationality and sex become irrelevant," that they must not constitute "artificial, arbitrary, and unnecessary barriers to employment [that] operate invidiously to discriminate on the basis of racial or other impermissible classification," and that they must not provide a "[d]iscriminatory preference for any group, minority or majority * * *," (cf.,

Griggs v. *Duke Power Co.*, 401 U.S. 424, 431).

This commitment is not based on the fallacy that there are selection criteria the predicative powers of which approach the accuracy of the litmus test. Rather it is predicated on the recognition that once a retreat is beat from "fair and racially neutral employment • • • decisions," (*McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 801), there is no equitable method of mediating between the competing claims of minority workers, majority workers, employers and the society at large.

Because the decision below rejects the proposition stated in *Griggs* and *McDonnell Douglas*, its effects are pernicious, although its intentions are the best.

Second, the AFL-CIO's commitment to equal opportunity as just defined has been manifested in two major parallel courses of action.

The Federation pressed for enactment of Title VII of the Civil Rights Act of 1964 (and the strengthening 1972 amendments), with the approving understanding that the union movement would be strictly regulated thereby. It has been the only multi-racial organization to thus prefer fidelity to the eradication of racial discrimination ahead of the self-interest in freedom from government dictation in the conduct of its internal affairs. As Bayard Rustin has recalled:

> "The union drive against discrimination was exemplified by the fight made by the AFL-CIO to have a Fair Employment Practices section written into the 1964 Civil Rights Act. Both President Kennedy and Robert Kennedy were opposed to including an FEPC

section because they thought it would kill the bill, but George Meany pressed for it. He did so for a simple reason. The AFL-CIO is a federation of affiliates which retain a relatively high degree of autonomy. The parent body can urge compliance with its policies, but the decision to act is left up to the affiliates. Meany felt that the only way the AFL-CIO could deal effectively with unions practicing discrimination would be to demand compliance with the law of the land. He testified before the House Judiciary Committee that the labor movement was calling "for legislation for the correction of shortcomings in its own ranks." And the passage of the 1964 Civil Rights Act greatly speeded the process of this correction." Rustin, The Blacks And The Unions, *supra* at p. 76.

In a complementary effort, the AFL-CIO has been a major force in a far-ranging affirmative action program, the Apprenticeship Outreach Movement, to assure that minorities have meaningful access to the most highly skilled and well paying technical jobs in industry. William M. Ross, the Deputy Executive Director of the Recruitment and Training Program Inc. of New York, in a speech to the Annual Rocky Mountain Apprenticeship Conference in Salt Lake City, delivered in November 1973, described the essence of the Outreach approach as follows:

"Above all else, the outreach approach is an advocacy strategy which is designed to provide a wide variety of tutorial and supportive services to minority workers who are seeking entry in the apprenticeship training programs and skilled jobs in the construction industry.

"The outreach concept originated in 1964 when The Workers Defense League established a program to recruit black and Spanish speaking youth for placement

in construction apprenticeship training programs in New York City. This program was the outgrowth of a series of violent demonstrations which occured at several construction sites in the city during the summer of 1963. These demonstrations, which were part of an attempt to halt all publicly financed construction in New York until 25 percent of the jobs in this industry were filled by black and Spanish speaking workers, resulted in hundreds of arrests and costly work stoppages. The Harlem hospital project, which was shut down for more than four months, cost the city of New York more than $250,000 for overtime payments to police alone. The total cost of this shut down ran into the millions.

"Together with most of the other civil rights organizations in the city, the W.D.L. became a member of the Joint Committee on Equal Employment Opportunity which was established to coordinate the various demonstrations. Initially, these protest activities were predicated on the belief that it would be relatively easy to find enough qualified black and spanish workers to fill the job slots which were being demanded, if sufficient legal and community pressure could be brought to bear upon the unions and contractors to force them to open their apprenticeship programs to non-whites. However, it soon became increasingly obvious that a special effort was required to seek out qualified applicants who would commit themselves to a career in the building trades.

"With a small grant from the Taconic Foundation, The Workers Defense League rented a storefront in the heart of the Bedford-Stuyvesant ghetto in Brooklyn and established a program to (1) disseminate information on construction employment opportunities; (2) to recruit, counsel, and tutor black and Spanish speaking apprenticeship applicants and (3) to provide follow-up sup-

portive services to the non-white apprentices who were accepted into the unions' training programs.

"Within our first two years, we had placed more than 500 black and Spanish speaking youths in apprenticeship programs.

"Because of our success in New York and the failure of other approaches in various cities around the country, our outreach concept was adopted as a formal program within the Manpower Administration of the U.S. Department of Labor in 1967. Subsequently, our approach became the model for several other local organizations throughout the nation.

"Since 1967, the apprenticeship outreach movement has grown by leaps and bounds. At the present time, there are 120 federally funded outreach programs in 227 different cities. Of this total

. . . 37 are operated by the Urban League's Leap Program

. . . 26 are operated by R-T-P

. . . 17 are operated by local building and construction trade councils

. . . 15 are operated by the AFL-CIO Human Resources Development Institute

. . . 24 are operated by other miscellaneous local organizations such as the Trade Union Leadership Council in Detroit and Philadelphia; The New Jersey Department of Labor and Industry; The Mexican-American Opportunities Foundation in Los Angeles; The Opportunities Industrialization Center in Pittsburgh, etc.

"Because of the apprenticeship outreach movement, there has been a dramatic and significant increase in

the number and percentage of minority youth in construction apprenticeship programs. For example:

> . . . In 1960, there were less than 2,000 non-white apprentices in the *entire United States*, and as late as 1966 non-white apprentices represented only two percent of all registered construction apprentices.
>
> "But between the time the outreach program was first funded in 1967 and July of this year more than 26,000 non-white youths have been indentured in registered apprenticeship programs in construction.
>
> | | |
> |---|---|
> | 274 | Asbestos Workers |
> | 1223 | Bricklayers |
> | 5372 | Carpenters |
> | 1126 | Cement Masons |
> | 2896 | Electricians |
> | 466 | Elevator Constructors |
> | 251 | Glaziers |
> | 1411 | Iron Workers |
> | 287 | Lathers |
> | 1603 | Operating Engineers |
> | 1909 | Painters |
> | 354 | Plasterers |
> | 1031 | Roofers |
> | 1289 | Sheet Metal |
> | 145 | Tile Setters |
> | 2410 | Pipe Trades |
>
> "At the present time non-white youths comprise approximately fifteen percent of all registered construction apprentices."

Both Title VII and the Outreach program are faithful to the premise that the rules of selection for employment must, in this Court's words in *Griggs*, make "job • • • qualifications the controlling factor, so that race, religion,

nationality and sex become irrelevant," (401 U.S. at 436). Indeed, perhaps the most significant fact about Outreach is that it puts the lie to the counsel of despair and condescension that racial preferences, such as that instituted by the University of Washingon Law School, are necessary because minorities can not compete on the basis of qualifications. As Mr. Ross noted in another passage of the same speech:

> "Our experience convinced us that *fairly* administered tests and other qualifications which are relevant to job requirements are not insurmountable obstacles to the entry of minorities into apprenticeship. Indeed, we are very proud of the tutoring techniques we have developed to overcome the testing problem. In fact, we have now reached the point where in some cities our applicants are achieving higher test scores than all other applicants, white or black. For example, 73 percent of our applicants scored 'high' on a recent test which was given by the Steamfitters Joint Apprenticeship Committee in New York. We have now reached the point where our applicants are better at taking tests than the average applicants."

The answer, in other words, is not to abandon our commitment to the allocation of employment opportunities on the basis of merit, a course that would be inconsistent with the urgent need to maximize productivity and efficiency to meet the critical economic problem we now face, but to refine our measures of merit and to provide those who have not received a sufficient grounding in basic skills the compensatory tutoring necessary to enable them to compete on the basis of qualification.

It is, we suppose, possible, in theory, that a system of

equal opportunity embracing the principles stated in *Griggs* and *McDonnell Douglas* could survive affirmance of the holding below. But it is not even remotely likely that this would be the consequence. The pressure, by a significant number of policy makers, for sweeping, short-term solutions to the agonizing economic problems of the minority communities, without regard to the unfairness of such solutions to those like Mr. De Funis, who have both legitimate aspirations and substantial problems of their own, is too intense. In this area, as in others in our political life, the overriding recent trend has been to ignore the long-term costs of utilizing questionable means to achieve the end sought.

Yet, those long-term costs promise to be immense. In an address to the AFL-CIO's Eighth Constitutional Convention, some five years ago, Mr. Rustin pointed out the factor that these planners overlook—it is that this country faces a racial problem consisting of "two elements—black rage and white fear [that] feed on each other and set this nation on a collision course." Proceedings of the AFL-CIO's Eighth Constitutional Convention, pp. 105-106. Obviously neither this rage nor this fear can be pandered to insofar as it is irrational. The program the labor movement has evolved does not do so. But the white fears engendered by racial preferences are not irrational. And such preferences, while they may give the appearance of answering "black [or more broadly minority] rage," do not do so in a meaningful sense. As Mr. Rustin noted:

> "We don't want special categories labeled 'Negro carpenters' or 'Negro plumbers' who have lower skills and get less pay. We want Negroes who are carpenters

and plumbers—with the same skills and training and wages that everyone else has. We want the same pride in our trade that any worker with dignity wants. And we will not settle for less." *Id.* at 111.

That result can only be achieved by affording equal employment opportunities as we have defined that concept. It will not be achieved by a program of racial preferences.

It is because of the foregoing considerations that the AFL-CIO has sought this opportunity to present its views concerning this case to the Court.

ARGUMENT

The profound central lesson of the Fourteenth Amendment for this case, is, in the words of the brief *amicus* of the Anti-Defamation League of B'nai B'rith in support of the petition for *certiorari* (at pp. 11, 12, 16), that the:

> "Constitutionality [of racial classifications] turns on whether [they] work any deprivation, and even if not, on whether they are justified by a compelling interest, by 'some overriding statutory purpose,' *McLaughlin* v. *Florida*, 379 U.S. 184, 192 (1964). 'Without such justification the racial classification . . . is reduced to an invidious discrimination forbidden by the Equal Protection Clause.' *McLaughlin* v. *Florida*, *supra*, 379 U.S. at 192-93.
>
> • • • •
>
> "[A] compelling state interest sufficient to justify a racial classification can be shown only if the classification is undertaken in the course of administering a remedy for proven prior discrimination, • • • [so that the] remedy has followed with precision a wrong shown with precision in a record • • •, or at least if, while

serving an allowable state purpose, it imposes no deprivation on anyone."

That statement of the law is drawn from, and meticulously documented to, this Court's decisions. To avoid needless repetition we therefore incorporate the discussion of those precedents in that brief by reference, take the conclusion reached as a given, and devote ourselves herein to enlarging upon and refining the basic proposition quoted above.

1. In allocating the 145 to 150 openings in the first-year class, the University of Washington Law School applied its test of qualification, expressed in essence in a weighted formula, the "predicted first year average," so that black Americans, Chicano Americans, native American Indians or Philippine Americans, but not Asian Americans, were treated separately from, and more favorably than, applicants of other races. The qualifications of these "minority" applicants were compared only with others in that group, and not against the entire universe of applicants.

The result was that "minority" applicants were accepted who would have been summarily rejected but for their membership in that class. Juris. Stat. App. C. Finding XXIII. In all, 44 minority applicants were accepted, 38 of whom had qualifications lower than Mr. De Funis, the plaintiff-petitioner here, who is white, and who was not accepted. Thus, "the admissions of the less qualified [minority] students resulted in a denial of places to those [of other races] better qualified." Juris. Stat. App. C. Finding XXIV.

There can be no dispute, then, that the Law School utilized a racial classification in determining who should be accepted for its first year class. And it is equally clear that

this deprived Mr. De Funis, and others similarly situated, of a right to compete for placement in the Law School under *some* system of selection that does not discriminate against them on the grounds of race.

2. There is no showing here that this racial classification and preference for minority students is justified as a remedy, either for present discrimination, or for the present effects of past discrimination.

(a) The record is barren of evidence that the Law School was motivated by an intent to discriminate against minority applicants. And there is no evidence that the School's present rules of selection have discriminatory consequences for minority applicants. Those rules as applied equally to all had produced a student body with a racial mix approximately that of the state (B'nai B'rith Juris. Stat. Brief, p. 14), and were based on criteria that reliably predicted law school performance of both "minority" and majority students.

In a carefully considered and comprehensive decision, *Vulcan Society* v. *Civil Service Comm.*, — F.2d —, 6 FEP Cases 1045 (C.A.2, Nov. 21, 1973), Judge Friendly has reviewed the standards for judging the legality of testing procedures challenged as discriminatory:

> "In Castro v. Beecher, supra, 459 F.2d at 732, the First Circuit stated that
>
> 'The public employer must, we think, in order to justify the use of a means of selection shown to have a racially disproportionate impact, demonstrate that the means is in fact substantially related to job performance.'
>
> Judge Coffin later referred to the defendants' obli-

gation to 'come forward with convincing facts establishing a fit between the qualification and the job.' Id. *** [A] showing of a racially disproportionate impact puts on the municipal or state defendants not simply a burden of going forward but a burden of persuasion. *** But if the public employer succeeds in convincing the court that the examination was 'substantially related to job performance,' an injunction should not issue simply because he has not proved this to the hilt.

* * * *

"Cases like this one have led the courts deep into the jargon of psychological testing. Plaintiffs insist that the only satisfactory examinations are those which have been subjected to 'predictive validation' or 'concurrent validation,' preferably the former. The district court defined these terms as follows: 'Predictive validation consists of a comparison between the examination scores and the subsequent job performance of those applicants who are hired'; 'Concurrent validation requires the administration of the examination to a group of current employees and a comparison between their relative scores and relative performance on the job.' The judge wisely declined to insist on either. The Fourteenth Amendment no more enacted a particular theory of psychological testing than it did Mr. Herbert Spencer's Social Statics. Experience teaches that the preferred method of today may be the rejected one of tomorrow. What is required is simply that an examination must be 'shown to bear a demonstrable relationship to successful performance of the jobs for which it was used.' Griggs v. Duke Power Co., 401 U.S. 424, 431; McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 n.14. To be sure, an impressive showing of predictive validation may end the inquiry then and there, and one of concurrent validation may come close to doing so; thus these methods may well be preferable in that sense. But these two schemes have their own

difficulties, and the failure to use one of them is not fatal, at least from a constitutional standpoint, as long as the examination is properly job-related." *Vulcan Society*, 6 FEP Cases at pp. 1049, 1050, footnotes omitted.

In the instant case even the threshold showing—"racially disproportionate impact"—necessary to require justification of the Law School's qualifications criteria has not been met. And, in any event, the "demonstrable relationship to successful [school] performance," which must be proved on that showing, is, as we understand the record, universally acknowledged.

(b) We hasten to add that none of this is to say that the present criteria are the only lawful ones, or, indeed, that Mr. De Funis or any one else has a Fourteenth Amendment right to insist on these or similar rules of selection.

The law is a field as broad as human experience itself. The range of permissible performance-related admission criteria is correspondingly broad. The Law School retains the primary responsibility for the development of sensitive and accurate measures of qualification attuned to its educational mission as the School defines that mission. In Judge Friendly trenchant paraphrase: "The Fourteenth Amendment no more enacted a particular theory of psychological testing than it did Mr. Herbert Spencer's Social Statics." *Vulcan Society*, 6 FEP Cases at 1050. But that Amendment did enact a ban on rules of selection based on racial classifications.

(c) Even proof of past discrimination against minority applicants would not validate the racial classification here

which works a deprivation of the constitutional rights of the majority applicants.

Initially, it is difficult, at best, to give content to the concept of past discrimination by the Law School against the minority applicants who are the beneficiaries of this preference. A number of attempts, by a single individual, over a period of years, to gain admission to a law school is the rare exception. Almost without exception to speak of past discrimination in this context, as the court below recognized, is to speak of overall societal failures or failures at a lower rung in the educational ladder.

The policy of "remedying" such discrimination by substituting racial criteria for criteria "shown to bear a demonstrable relationship to successful performance," (*Griggs* v. *Duke Power Co.*, 401 U.S. 424, 431), suffers from four fatal flaws:

First, "the individual [majority applicant who is not admitted] may have had no part in discrimination against blacks; to impose on him the costs of remedying societal discrimination seems unjust. It is all the more unjust since the burden would fall most heavily on whites who are themselves relatively deprived." *Developments In The Law —Employment Discrimination And Title VII Of The Civil Rights Act of 1964*, 84 Harv. L. Rev. 1109, 1116. To weight economic competition in this fashion against those who can not be said to have meaningfully participated in a wrong is impermissibly close to imposing punishment on the ground of "collective guilt," in effect creating "attaints of the blood" for all members of non-minority groups.

Second, such racial classifications:

"have serious countereducative effects. Gordon Allport

> has defined ethnic prejudice as 'an antipathy based upon a faulty and inflexible generalization.' A crucial objective of any antidiscrimination [program] must, then, be education; it must break down faulty racial stereotypes. Preferences, however, have the reverse effect. * * * [W]hite [applicants], resentful of being turned down * * * due to minority quotas, will only have their stereotypes reinforced by a government that proclaims blacks and other minorities to be in need of special advantages." *Ibid;* footnotes omitted.

Both of these factors, as we have pointed out (at pp. 3-4, 11-12 *supra*) tend to create and maintain legitimate white fears, thereby increasing social tensions and exacerbating the overall racial dilemma.

Third, the paternalistic grant of "benign" preferences serves to demean the recipient in his own eyes. The reinforcement of invidious stereotypes just noted is not confined to the majority applicants who are discriminated against. See McPherson, *The Black Law Student: A Problem of Fidelities,* Atlantic Magazine, April 1970, p. 88; Graglia, *Special Admission Of The "Culturally Deprived" To Law School,* 119 U. of Pa. L. Rev. 351, 353-359. By the same token this device tends to deprive minority applicants, who have in fact qualified on merit, of the full recognition for their achievement they richly deserve. See pp. 11-12 *supra.*

Fourth, it is a delusion to believe that the overall interests of society are advanced by diluting the reliance on qualification and relying on race in selecting those who will fill a limited number of positions (either in a professional school class or a job market). To the extent that well paying positions are plentiful and there is an economy of

abundance, modifying rules of selection in this manner may be of relatively little moment except to those directly and adversely affected. But neither of these conditions obtain. These are not times that allow the prodigal waste of scarce resources, the most valuable of which is "efficient and trustworthy workmanship assured through fair and racially neutral employment and personnel decisions," (*McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792, 801), responsive to the expectation that achievement brings rewards. Thus:

> "Many economists have suggested that in increasing equality, productivity should not be sacrificed. Instead, output should be maximized and changes made in the way that output is distributed. Such an approach is a more refined and efficient means of giving aid, since the beneficiaries can be identified more precisely and the true costs of the process can be computed with greater precision." *Developments—Title VII,* 84 Harv. L. Rev. at 1115.

The sum of the matter is that this racial classification is "an invidious discrimination forbidden by the Equal Protection Clause, (*McLaughlin* v. *Florida,* 379 U.S. 184, 193), because the guarantee of the "equal protection of the laws" can not be squared with a system that deprives members of one race of their rights in order to provide "recompense" to members of another.

This conclusion accords with that reached by Congress. Cf. *Katzenbach* v. *Morgan,* 384 U.S. 641. The problem here is in all essential respects that treated in Title VII, where Congress banned all employment discrimination against minority groups, (§§703(a)-(d)), *as well as preferences for*

them (§703(j)), and affirmed the lawfulness of job-related qualifications, (§703(h)). As this Court stated in *Griggs* 401 U.S. at 430-431 (footnote omitted):

> "The Court of Appeals' opinion, and the partial dissent, agreed that, on the record in the present case, "whites register far better on the Company's alternative requirements" than Negroes. 420 F. 2d 1225, 1239 n. 6. This consequence would appear to be directly traceable to race. Basic intelligence must have the means of articulation to manifest itself fairly in a testing process. Because they are Negroes, petitioners have long received inferior education in segregated schools and this Court expressly recognized these differences in *Gaston County* v. *United States*, 395 U.S. 285 (1969). There, because of the inferior education received by Negroes in North Carolina, this Court barred the institution of a literacy test for voter registration on the ground that the test would abridge the right to vote indirectly on account of race. Congress did not intend by Title VII, however, to guarantee a job to every person regardless of qualifications. In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification"

The critical difference between *Gaston County*, on the one hand, and *Griggs* and the instant case, on the other, is that in the former the method utilized to eradicate the

effects of past discrimination did not deprive any other voter of his rights, while in the latter, to substitute selection on the basis of race for selection on the basis of qualification does impinge on the rights of those not accorded the preference, because their opportunity to obtain one of a limited number of places is correspondingly diminished.

(d) The burden of the argument thus far has been that racial classifications that result in a preference, in securing one of a limited number of openings, to less qualified "minority" applicants over more qualified majority applicants, as measured by criteria "shown to bear a demonstrable relationship to successful performance," (*Griggs*, 401 U.S. at 431), do not meet the requirements of the Constitution. There is a contrary line of authority in the lower federal courts upon which the court below relied. The most recent decision in that line is *Associated General Contractors* v. *Altshuler*, ——F. 2d——, 6 FEP Cases 1031 (C.A.1, Nov. 30, 1973), which cites and analyzes the earlier cases.

In *Altshuler*, the court sustained the validity of a requirement, imposed by the Commonwealth of Massachusetts, upon contractors engaged in publically funded construction, that the contractor must:

> "'. . . maintain on his project, which is located in an area in which there are high concentrations of minority group persons, a not less than twenty percent ratio of minority employee man hours to total employee man hours in each job category. . . .'"
>
> • • • •
>
> "The Secretary of Transportation and Construction

> for the Commonwealth, who is charged with enforcing [this] provision, interprets [it] to mean that [the Commonwealth] requires the hiring of only 'qualified' workers."

Contractors who do not meet this ratio are subject to sanctions unless at a hearing they demonstrate that they have taken "every possible measure to achieve compliance." 6 FEP Cases at 1014.

The First Circuit recognized that:

> "The Commonwealth's affirmative action plan forces us to address a fundamental question: are there constitutional limits to the means by which racial criteria may be used to remedy the present effects of past discrimination and achieve equal opportunity in the future?" 6 FEP Cases at 1019.

The answer it proposed was that rules of selection may be based on racial criteria so long as these do not require preference to "unqualified minority workers," and so long as the employer is granted the opportunity to prove that the only reason he did not meet his assigned "goal" is that to do so he would have been required to hire "unqualified minority workers." 6 FEP Cases at 1019-1021. This was in essence the approach of *Contractors Ass'n. of Eastern Pa.* v. *The Secretary of Labor*, 442 F.2d 159 (C.A.3) cert. denied 404 U.S. 854, where the court relied upon the assertion that the goals and timetables for minority hiring there set would not "eliminat[e] job opportunities for white tradesmen," (422 F.2d at 173).

But, neither the First Circuit, nor the Third Circuit (or the other of the lower courts that have embraced this position), have explained the justification for discriminating in

favor of less qualified "minority" workers and against more qualified majority workers. This is undoubtedly because no justification exists. The harm to the majority worker who is thereby unemployed is precisely the same. (It is, in fact, precisely the same as the harm visited upon a more qualified "minority" worker who is rejected on racial grounds in favor of a less qualified majority worker.)

This Court has therefore emphasized that:

> "Congress has not commanded that the less qualified be preferred over the better qualified simply because of minority origins. Far from disparaging job qualifications as such, Congress has made such qualifications the controlling factor, so that race, religion, nationality, and sex become irrelevant." *Griggs*, 401 U.S. at 436.

Equally [illegible], it is not constitutionally sufficient that the better qualified worker had an attenuated opportunity for a job, rather than having his job opportunities "eliminated". For, his right is to a system of selection embodying "fair and racially neutral employment and personnel decisions," (*cf., McDonnell Douglas*, 411 U.S. at 801).

(e) The conclusion that the decision below, and kindred decisions such as *Altshuler*, are wrongly decided does not "provide equality of opportunity merely in the sense of the fabled offer of milk to the stork and the fox." *Griggs*, 401 U.S. 431. The argument pressed here rests on the premise that, if a method of selection "which operates to exclude Negroes cannot be shown to be related to • • • performance, [it] is prohibited." *Ibid.* Moreover, organized labor's entire response to the challenge of providing equal employment opportunity is predicated upon the recognition: first, that the range of affirmative action open to

enable "minority" Americans to meet performance-related rules of selection is, and should be, all but unlimited; and, second, that affirmative action, in this sense, does work. See pp. 5-10 *supra*. But we do insist that Government may "not command that any person be [preferred] simply because he was formerly the subject of discrimination, or because he is a member of a minority group," and that the Constitution does forbid "discriminatory preference for any group, minority or majority," (cf., *Griggs*, 401 U.S. at 431).

CONCLUSION

For the reasons set out above, as well as those stated by the petitioners, and the other *amici* supporting their position, the decision below should be reversed.

Respectfully submitted,

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